UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #1:19-cv-08655-LGS-GWG
ROWE, ULKU,	:	
Plaintiff,	:	
- against -	:	
GOOGLE LLC,	:	New York, New York February 3, 2021
Defendant.	:	
		TELEPHONE CONFERENCE
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PROCEEDINGS BEFORE
THE HONORABLE JUDGE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: In the matter of Rowe v. Google, LLC, docket number 19-cv-8655.

Counsel, state your names for the record, please, starting with the plaintiff.

MS. CARA GREENE: Cara Greene of Outten & Golden for the plaintiff, Ulku Rowe; and together with me today is Maya Jumper and Shira Gelfand, also of Outten & Golden.

MR. KENNETH GAGE: For Google, this is Kenneth Gage from Paul Hastings. And also on the line for Google is Sara Tomezsko.

MS. SARA TOMEZSKO: And Elliot Fink, as well, from Paul Hastings.

MR. GAGE: Oh, my apologies. Elliot Fink, your Honor, is a new associate. He just started. He does not have an appearance, but he is observing.

HONORABLE GABRIEL W. GORESNSTEIN (THE COURT): All right, we're here based upon two applications. One is for discovery, Docket 79; and the other is a motion to file a supplemental pleading. We'll start with the discovery dispute.

I guess I would like a little bit of the big picture here in terms of -- and maybe I need to get it from the defendant. I'm trying to understand what -- I'd like to understand more about burden before we get to relevance. So

your letter really didn't articulate any, well, at least not specifically. And it may be that that's not your main argument, but I want to just get an answer to that question.

MS. TOMEZSKO: Sure, your Honor. And this is Sara Tomezsko from Paul Hastings on behalf of Google. The discovery that plaintiff is requesting here is for, you know, approximately 300 people at Google in various positions that we would argue --

THE COURT: I'm surprised to hear the number 300, only because your letter said 200. It did say over 200, but I didn't realize it was that high.

MS. TOMEZSKO: Right. So we said over 200. At that time we were sure that there were over 200. We have since gone back and recalculated to get a more exact number, and it is closer to about 300 people.

But to answer your particular question about burden, your Honor, the documents that they are requesting and the information they are requesting for these individuals is stored in several different places at Google. We have asked the client to articulate, okay, if we were going to get this information, what would it entail and how long would it take. So the most burdensome item to collect would be workday profiles which demonstrate the job

history for these people and their compensation history, which falls into a couple of buckets of documents and information that they have requested and also Perf, so their performance reviews across the time when they held these alleged similarly situated positions and G-Hire Dossier data. Now, the G-Hire Dossier, just so your Honor has context, would illustrate the positions that these people applied for or interviewed for and the feedback that they received on their qualifications for the role. That will take us --

THE COURT: For the particular job at issue or in their entire lives?

MS. TOMEZSKO: It's difficult, if not impossible, to isolate just the information for the particular job at issue, unfortunately. And so the way the data is stored and the way the data would have to be pulled necessarily requires that it would be the entire length of time that they have sought a position at Google. We're unable, at this point, to isolate just the particular job at issue.

THE COURT: Okay. Were you done or --

MS. TOMEZSKO: No, I just wanted to add that we're going to have to get this from multiple places, access multiple teams at Google to pull the information. And for this number of people, it would take a minimum of 30 days

to collect, perhaps more. And that's if the people on the ground are putting in a substantial amount of their workday to actually do the collection and review.

THE COURT: Okay. I mean, I guess, you know, I'm a little surprised it's of that level of burden. And maybe you can tell me some aspects are more burdensome than others. But all the email I understand when you need to charge to search terms and engines and so forth -- I'm sorry -- search terms and culling and often, you know, privilege issues and so forth. This stuff doesn't seem to involve any of that. It's just a question of pulling them out and -- but probably not terribly voluminous, I don't know. Some of it may be perhaps beyond relevant. I'm not sure why someone's personal history at other jobs or applications they made to other jobs would have any bearing on this. And maybe there's some way to reduce it. But it's sort of hard to understand why it could be characterized as being burdensome.

MS. TOMEZSKO: Well, the way the data is stored in the traditional course, your Honor, it's not normally stored as a document that we could easily find and pull from the shelf. It is stored in what's called the G-Hire system most of the time, depending on what we're talking about here. So let's just focus on the dossier data, which

would say for the positions that we're talking about, the interview feedback that they got and their assessment of the qualifications for the role, right.

THE COURT: Can I just -- can you stop right there? Because I'm not sure I'm following this. Let me try to put it in my terms, and you tell me where I got it wrong.

MS. TOMEZSKO: Sure.

THE COURT: What I understand is that there are certain job codes -- I'm probably using the wrong word -- but they had a four-digit code associated with them. There are certain people who, in the right time period, occupied that code. And that's a finite number of people, and you tell me it's [indiscernible] or whatever it is. But for a particular -- so if the plaintiffs are now looking to that person and trying to [indiscernible] with them, it seems to me she needs to know what he's supposed to be doing on that job, certainly; needs to know the salary; needs to know the content and the salary. But I don't understand why she would need to know where that incumbent, where that person had -- if that's what you're talking about -- had applied to other positions in his life at Google and how people saw him -- [indiscernible] and how people saw him or perceived him to be qualified for those other positions.

MS. TOMEZSKO: Well, I would say there's two responses to that question, your Honor. Number one is we would agree with you that the other positions that they applied for that are outside the scope of the positions for which they're requesting information are not relevant here. Unfortunately, the way that the data is stored is such that we can't separate their qualifications as they were reviewed in the interview process for the roles that plaintiff is seeking from anything else. When it's exported, it's exported as one.

THE COURT: I see.

MS. TOMEZSKO: And we could talk about, you know, whether redactions are necessary or not, but that is essentially the process for how the data will be exported in terms of it being collected.

Now, why they need that data --

THE COURT: And could I just understand, you know, unlike email review, which requires a lot of judgment, why isn't this a question essentially of someone, you know, pushing buttons and having things be spit out? What judgment has to be brought to bear in producing these documents? That's what I don't understand.

MS. TOMEZSKO: I don't know if it's a question of judgment; I think it's a question of mechanical process.

So do they -- well, first of all, it's not as simple as, you know, pushing a button because the data is raw data. Right? In order to get it into a format where it looks like, you know, a PDF, similar to the way it was produced for plaintiff and other technical solutions consultants is an additional step. But if we're going to do it manually for 300 people, that's 300 times you have to push the button. Alternatively, we can ask the team over at Google to write a code, essentially, that says, like, we're looking for these people, collect this data from the G-Hire system, the raw data as it is stored in the back end. And then that process takes time to actually run, and then the results need to be validated to make sure it worked accurately. So that's --

THE COURT: Okay. That sounds better than someone pushing 300 buttons, writing a program to do it, I agree.

MS. TOMEZSKO: Exactly.

THE COURT: Go ahead.

MS. TOMEZSKO: But to return to your other question about why they need the data that they're requesting here for the G-Hire dossiers and things like that, I would respectfully say that that's probably a question for plaintiff, as it is within the scope of the documents that they requested. If we were ordered to

produce that, I just described to you, you know, the burden that would be associated with the collection; but, as you might imagine, our position is that they don't necessarily need it. But it is what they asked for, so I was responding to the scope of discovery that is being sought here.

THE COURT: Yes. I didn't want to take you down a road that's really not what I'm trying to get at because if some irrelevant data is produced, that's not my problem. What I was trying to figure out is if we narrowed the document request, would there be some easier way to do it. And it sounds like there is no narrowing other than lopping off job codes and titles; there isn't a way to make the production easier for you once -- if I were to order as to any specific titles, is that a fair thing to say?

MS. TOMEZSKO: I think it is fair, your Honor. And we have been focusing specifically on the G-Hire data. But I would also note for the compensation data, I mean, that is stored in a couple of places. It could be stored in G-Comp. And, again, that is -- it's similar to the G-Hire system in which that exists as raw data. And so we would have to either press that button 300 times, to use the analogy I used before, or write code. But the equity portion of the compensation, which is also something that plaintiffs are seeking, we have to go to a different source

to get that. And that's not as easy to collect because we would have to say, you know, we need the information for these people, their equity account summaries, the equity that they were granted, the vesting date, and whether any of it was withheld. And that is a little bit more of -- it's not as easy a process as writing a code, necessarily, to pull that data from the back end of a system in which it's stored in the ordinary course as raw data.

THE COURT: All right. Let me turn to plaintiff, just on this sort of related topic before we get to other parts of this. So let me ask the plaintiff -- and, Ms. Greene, you're speaking for plaintiff?

MS. GREENE: Yes, your Honor.

THE COURT: Okay. If I allow any of this to proceed and I allow you to get documents, are we done; or are you expecting depositions or more or what happens?

MS. GREENE: No, your Honor, at this point in time, this is the last remaining issue with respect to discovery, and we're not anticipating seeking additional depositions in response to the production.

THE COURT: Okay. All right. So I guess we should get a little bit into the substance.

MS. GREENE: Your -- I'm sorry.

THE COURT: Go ahead.

MS. GREENE: I was wondering if I may just briefly note that Google has produced the data that we're seeking with respect to other individuals that they have agreed are comparators. So they know what information exists, they know how to get this information. In many respects, the burden is so minimal because of Google's method of having systems where the information is stored. It has a compensation information where all this is, it has a hire system where it retains all this information. So here, really, the burden, it is quite minimal.

MS. TOMEZSKO: If I may respond to that, your Honor?

THE COURT: Sure.

MS. TOMEZSKO: As you might imagine, I disagree with Ms. Greene's assessment. The burden is as we described. You know, whether that's minimal in plaintiff's view or not, the burden is what the burden is; and it's the mechanical process I just described. We do not agree that all of the people for whom we produced information are comparators. We did produce information for those individuals -- and this includes people who are technical solutions consultants -- the job that Ms. Rowe, the plaintiff, holds at Level 9. And we understand that there is a dispute amongst the parties as to whether those are

truly comparable positions, and we know that we're going to have to hash that out on motions for summary judgment, but we agree that there is at least enough similarity to make the information discoverable.

It also includes Global Technical Client Leads, which is one of the positions that is raised initially in plaintiff's letter motion. And so we have produced data for that small number of people. I think it's, you know, between 28 and 30. But the reason that we have produced that information in the format that we has is that was a small subset. It's a lot easier to create it and present it in a way that's easily digestible in a PDF format because it's a small number. If we're required to do that for, you know, 300 people, that's a much, much greater burden to actually present it in that format. So I don't think it's accurate to say that it is stored that way and there's minimal burden associated with producing it that way, particularly when we're talking about the number of people at issue here.

THE COURT: Well, let's talk about numbers a little more. I think, you know, burden is part of the issue here. And it's a little jarring to have, you know, a change from 20 comparators to 300 comparators. I mean, that's not, in my experience in equal-pay cases -- we don't

get that many of them, but I've had enough -- I mean, the numbers of comparators that are trying to be fit into this universe is kind of off the charts. So I'd like to understand -- and it may help me in paring this down -- to understand the numbers that go with each of these different codes. I don't know -- I hate to spring this on you -- does someone here -- I guess it's the defendants who would have the answer to this question, if I start going through -- I'm trying to think -- I can either use your letter or their letter. They group this into five pieces, Application Engineer 1 and 2 through job codes, and then Director SWE, Director of Product Management, BNU Director, and then finally, the Global Client Leads, can you associate numbers with each of those five categories?

MS. TOMEZSKO: Your Honor, I don't have exact numbers right now. I can certainly provide them if given time to look at the data. But what I can tell you is Global Client Leads, smallest amount. And that's because of the nature of the role, right? It was conceptualized in June of 2018, and we can't go into Google's HRIS system and look for that job title because it's not a job title that is necessarily stored in that system. Its something of a business title whereby someone's job title is something else but they call themselves a Global Client Technical

Lead. So for that --

THE COURT: Well, didn't I read somewhere that someone identified seven of them, or was that something else?

MS. TOMEZSKO: No, I think you did read somewhere that -- and I think that was in plaintiff's letter, if I'm not mistaken -- plaintiff can confirm. But that's taken from recollection of witnesses who were deposed on that particular issue, because that's the best source of information for just determining who actually held that position.

THE COURT: Right. And that may be perfectly satisfactory, from my point of view, if that's the best way to do it. Anyway, so that's probably --

MS. TOMEZSKO: That's the smallest

THE COURT: -- in the range of seven. How about these other categories?

MS. TOMEZSKO: The largest group by far is Software Engineers and Directors of Software Engineer. I apologize; I don't have the exact number at my fingertips right now, but I would say that it's -- I don't want to say half, but it's roughly -- you know, I would say it's a majority of the people on the list. I think the second highest is probably Product Manager and the Director of

Product Manager roles with Application Engineering being a close follower to that; but I would say the overwhelming number of the people that we're talking about are Software Engineer Directors.

THE COURT: You skipped Director SWE, and that's the --

MS. TOMEZSKO: Oh, I'm sorry, yes. That is synonymous with Software Engineering Directors. It's referred to as Director SWE, Software Engineer.

THE COURT: Oh, so what about DNU Directors?

MS. TOMEZSKO: DNU is essentially like the same position as a Software Engineer Director, but the DNU indicates that it is a code that is no longer used at Google. So this was someone who perhaps during the period of time that we're talking about still acts as a Software Engineer Director but their job code has been deprecated. So they filled that job code much earlier than the time period at issue here and they're still in it but do not use or DNU indicates that as of, you know, the date that it was deprecated, no one is actually stepping into that job code anymore. So that is a small number of people as compared to the rest of everyone else.

THE COURT: How many in the Application Engineer role, do you know?

MS. TOMEZSKO: I, unfortunately, don't have that number offhand.

THE COURT: Okay. I've sprung this on everyone.

Well --

MS. TOMEZSKO: I would like to be able to tell you, your Honor, but --

THE COURT: No, I understand.

You know, this is the worst possible forum in which to make these judgments because this is discovery; this is not a Motion for Summary Judgment on comparatives. And, you know, I've read your letters, and it doesn't seem like plaintiff has a strong case with any of these [indiscernible]. But that doesn't mean that -- it was presented in a sufficient forum in the letters because this wasn't a Motion for Summary Judgment. I don't think that everything possible out there was marshaled, and it was very hard to get a good understanding. And I'm very loath to try to figure this out in the context of a discovery motion, which is why, you know, burden is so important.

On the other hand, the numbers, to me they're just through the roof in terms of comparators. And now that I know there's at least some burden associated with this, you know, the notion of getting data on 300 people is not acceptable. But I would like to try another way to handle

this; and if people tell me it's impossible, then I'll have to do something else. My thought is to put plaintiff in the driver's seat and say I'm prepared to give you a certain number additional, and the number I have in my head is 50, which I think is an extremely generous number, and say you know what, you figure out how to do this. You can tell them to randomly select among a code, you can give them specific names, you can do whatever you want, but you can't make them go down this road for more than 50 people. And also on the understanding there's no further discovery beyond the things that are requested here. And also, if there's some particularly burdensome aspect that gets identified as to some particular individual or code or whatever it is, the defendants will have the right to come back to me.

So turning to the plaintiff now, I'm not asking you to say you agree with the ruling, but do you -- are you going to have a mechanism to get this to 50? And if not, I can try to figure out a way to do it.

MS. GREENE: Yes, your Honor. I believe that, you know, looking at the information we have thus far, there's a way that we could get to that across the different job codes that we've identified.

THE COURT: Okay. All right, well, that's my ruling, then. Any questions about it before we move to the

next thing; any questions from defendant's side?

MS. TOMEZSKO: Yes, your Honor. I just want one point of clarification, and I think it addresses a materially substantive issue here in terms of which jobs we're actually going to be targeting for collection. One point that we made in our letter is in response to plaintiff's argument that the jobs are in a sense fungible because they're easily transferrable from one job ladder to the next. And what I wanted to highlight here, and I think it's particularly relevant for selecting a subset of jobs is that in the three instances that plaintiff presented in terms of someone transferring from a Technical Solutions Consultant role to either a project management role or a software engineering role, these are three individuals who are at Level 9; and upon transfer, they were down-leveled in their new ladder to a Level 8. And --

THE COURT: Can I give you another way to look at this?

MS. TOMEZSKO: Sure.

THE COURT: The more irrelevant comparators they select in their group of 50, the better for you. So if you tell me to take out these people, they're going to substitute them with three other people, and then you're going to be in a worse position. What do you think?

MS. TOMEZSKO: Well, I'm not necessarily saying that they should take out those three people. The reason I highlighted it is because we don't -- like, we're concerned as to getting the relevant data here, as well, right? Like, so we're not trying to lead plaintiff down a route where she's requesting irrelevant data; but I think it is a relevant fact that when someone transfers into these roles, they're generally down-leveled. So to the extent that we're looking at jobs to consider here and individuals or perhaps, you know, a subset of individuals in each job ladder, it's probably fair to say that we should be looking only at Level 8 in those project management role, in the software engineer role, or, you know, the Application Engineer role because in no reality is a Level 9 individual in those roles comparable.

THE COURT: Well, you didn't answer my point.

MS. TOMEZSKO: The point being that --

THE COURT: Why isn't it good for you if she uses up three of her selections on these Level 9 people? That's good for you. She's wasted three of her --

MS. TOMEZSKO: I mean, it can be -- right, but then we'd have to be arguing about those people on summary judgment, and --

THE COURT: Right. I don't want to have that

argument here; I want you to have it on summary judgment. That's my point.

MS. TOMEZSKO: If that's how your Honor wants to proceed, I am completely fine with that. I just wanted to throw this out there as a consideration to possibly further, maybe even between the parties, limit how we do this and see if your Honor found some value in directing the parties to limit it in that way.

THE COURT: Yes, I'm really looking at this as an effort to not make these decisions in the context of a discovery motion. And it seems to me the defendant's interest is in not being burdened on discovery -- right now that's their interest, at least. And I've solved it by vastly cutting down the request, and it's no more burdensome to search for the documents on these Level 9 people, the pre-Level 9 people, than it is for anyone else. So I'm just putting this off to the summary judgment. I mean, if this becomes -- you know, I suspect that Judge Schofield has limits on pages of summary judgment motions, and the plaintiff's going to have to make some decisions about what comparators she's willing to, you know, try to shoot for. And maybe you'll persuade them, you know, outside of this phone call that this is not the way they want to go. But if they decide to go that way, they will

have, in a sense, wasted something in your view by focusing their effort on that. So I'm going to adhere to the decision.

Any other questions about the decision from plaintiff's side?

MS. TOMEZSKO: Just one clarifying question. And understood on your point that we just discussed. I just want to make certain that the order is that we produce all of the information that plaintiff has requested for these 50 people that they pick, or are there limits being placed right now on the --

THE COURT: There's nothing being replaced right now. What I said was they pick the 50; they should do it as soon as possible, and then you should produce the requested documents. However, I'm letting you come back to me on burden. If it turns out that if [indiscernible] something else, that it's just too burdensome, then you are absolutely welcome to come back to me, because I don't think that we've been able to flesh that out enough now. And I'd rather have a discussion between the parties about it once I've set parameters for how many people we're talking about. And there's a different argument on burden when we're talking about 50 people than talking about 300 people. So the presumption is yes, produce everything; but

if there's a burdensome issue, you should talk about it with the plaintiffs. And if you think you've got it -- have a good shot with me because it truly is, you know, a burden that Google cannot possibly bear or should not be required to bear, then you're welcome to come back to me.

MS. TOMEZSKO: Understood. Thank you for the clarification, your Honor.

THE COURT: Okay. Any questions from plaintiff's side?

MS. GREENE: None from plaintiff.

THE COURT: Okay. Let's move [indiscernible].

MS. GREENE: Ms. Jumper will be handling this argument, your Honor.

THE COURT: Okay. [Indiscernible]

MR. GAGE: Your Honor, are you still there? You're breaking up.

THE COURT: Could the plaintiff's counsel spell the last name? It's not in the letter.

MS. MAYA JUMPER: Sure. Yeah, it's Jumper, J-u-m-p-e-r.

THE COURT: Okay. And --

MS. JUMPER: And I'm also having a little bit of -- okay, I can hear you now.

THE COURT: Okay. I'm going to try to speak up.

And who's speaking for defendant?

MR. GAGE: Your Honor, this is Ken Gage. I'll take this motion.

THE COURT: Okay. All right, well, it's -- well, let me start with the same question. If you get this claim in, am I to understand from the plaintiffs that that's it, you're not seeking any further discovery?

MS. JUMPER: That's correct at this time, your Honor.

THE COURT: Okay, well, you say "at this time." If I allow it, that's it; I mean, you're not going to get anything further. Now, whether I allow the defendant to redepose the plaintiff is another question, but I just wanted to understand what the prejudice argument is.

All right, so from defendant's point of view, your prejudice is that you feel you would have to redepose the plaintiff?

MR. GAGE: That’s correct, your Honor.

THE COURT: All right, so now we have to balance that -- I mean, let me just address utility. I'm not, at this stage, going to find it's futile. I don't know that you have to go through a formal application process in order to make a claim like this. So we're left with -- I don't see any bad faith, either -- we're left with undue

delay. So why don't I hear from plaintiff on that and then on defendant -- hear from the defendant?

MS. JUMPER: Sure, your Honor. So plaintiffs have moved under Rule 15(d), which allows a party to serve supplemental pleadings, setting out any event that's taken place after the filing of the pleadings here. And that's what's occurred. In February of 2020, plaintiff was the subject of retaliatory action; and as a result of that action, we took steps to further undertake discovery and have set forth claims of retaliation arising from that conduct. It's our position that plaintiff has moved promptly to not only notice those potential retaliatory claims to defendant, but that defendant was also aware of them far in advance of the filing of the motion. Plaintiffs have, since the beginning of discovery, made the VP of Sales role a part of their requested discovery, and that's acknowledged in numerous exchanges between plaintiff's counsel and opposing counsel, one of which was exemplified or attached as an exhibit to defendant's opposition, where in October of 2020, defendant essentially forecasted future retaliation claims arising from that conduct.

Furthermore, it's our position that defendant was also on the email correspondence --

THE COURT: I'm sorry, what did you mean by "forecasted"? I couldn't quite follow that.

MS. JUMPER: Sure. So, in Exhibit A of defendant's opposition, there's a statement that says, "It seems to us that the only documents relevant to any retaliation claim Ms. Rowe might assert with respect to this opportunity would be limited to her candidacy only." So in that articulation or assertion, defendants essentially have forecasted that a potential retaliation claim might be forthcoming.

And so, you know, defendant's argument that these retaliation claims were coming out of nowhere or that they weren't noticed of them is just simply belayed by the record.

And, you know, further, in terms of undue delay, you know, the Court's jurisprudence is pretty clear that, you know, mere delay, even if the Court were to consider, you know, the nine months that elapsed to be unduly or to represent or constitute undue delay, the case law says that mere delay is not sufficient grounds to deny a supplemental request alone.

THE COURT: I think, you know, part of their contention is that you had everything you needed, at the latest, in July, when you learned about, I think, whatever

that entry was being made in the system characterizing the plaintiff in this unfavorable, what you view as an unfavorable way. So there was a six-month delay, it seems. I would say it seems measurable from July, not October.

MS. JUMPER: Well, it's also plaintiff's position that the deposition of Stuart Vardaman was essential to plaintiff's ability to fully lay out her new allegations. The information that plaintiff wanted to discover and glean from that deposition go clearly to developing plaintiff's prima facie case for retaliation primarily to the factors of retaliatory motive or animus. And so it's our position that it was not until after the deposition of Stuart Vardaman that plaintiffs were able to fully understand the universe and fully understand all the details of the alleged conduct to be able to put forth a detailed allegation for the Court.

THE COURT: All right. I'll hear from defendant on this.

MR. GAGE: Thank you, your Honor. And I appreciate that your Honor is rejecting our futility argument, but I think it's relevant to the question you asked about delay to look at the allegations in the operative Complaint regarding retaliation compared to these supplemental allegations. And there's a stark contrast. We

were on notice of the allegations in the operative Complaint where the plaintiff alleged that she sought this VP of Financial Services job that lesser-qualified external finalists were being considered, she alleged. She alleged in her operative Complaint that a less-qualified man was selected for the job. She alleges that Google did not follow its normal procedures in filling that job. And she alleges that these things happened in retaliation for her complaints. Those are in the operative Complaint. That's what we were on notice of, and we had to explore all of those things in her deposition.

When you contrast the specificity there with the proposed supplemental allegations -- again, we don't even believe the supplemental allegations rise to a plausible claim of retaliation. All they add is that the recruiter, who was involved in that VP of Financial Services search in 2018, was interviewed by Employee Relations in 2020. They allege in the supplemental allegations that he thought she was cantankerous. They allege that she asked him thereafter for the job description of this sales position. They allege that he gave it to her. They allege that she was interested in the job, and they allege that she wasn't considered. And that doesn't even plausibly rise to the level of a retaliation claim.

But, again, I recognize your Honor's view on the futility argument, but we didn't have notice of this until after her deposition. And, frankly, your Honor, this plaintiff claims that she's comparable to upwards of 300 other people. We had our work cut out for us in seven hours. And so, yes, I asked her some questions about this job, but at that point, plaintiff had not put us on notice that she was adding a complaint or a claim regarding that sales job. Again, she alleges in the operative Complaint that she's an engineer or technologist and alleges that she's comparable to all these technical positions and engineering positions. Well, now she's saying that she was deprived a sales job.

We were not given timely notice of this. They waited until after her deposition. They waited until nearly the end of discovery to file this motion. And, therefore, we believe there was delay; we believe there is prejudice.

MS. JUMPER: If I could respond to that, your Honor --

THE COURT: No, it's not necessary.

MS. JUMPER: Okay.

THE COURT: Maybe I wasn't clear. I'm trying to focus on -- I was trying to focus on the delay issue. And

I'm sorry if I wasn't clear on that. And we'll get to prejudice.

MR. GAGE: I'm sorry --

THE COURT: Hold on. Let me just finish.

MR. GAGE: Yes, your Honor.

THE COURT: So what I'm trying to figure out is at what point did they have -- maybe we have to back up. I understand you don't think there's a claim, and I just want to make clear I'm not ruling there is a claim. Futility is just one of several factors to be considered, and you're free to make a Motion to Dismiss or a Summary Judgment Motion or whatever else saying that this does not legally constitute retaliation. But if it were to come in as a Complaint, I still need to figure out if they had what they needed to know to make these allegations, you know, much earlier than when they did, in December. I mean, I know you could say, Well, she knew she was rejected in February, or whatever the right word is; and they said, Well, we didn't know that there was some, you know, improper animus behind it until we got some of this other discovery. That's the issue I was trying to get you to answer.

MR. GAGE: And to that question specifically, your Honor, you said it earlier: They had everything they needed to articulate what is in the proposed supplemental

allegations back in July. They knew Mr. Vardaman had been interviewed by Employee Relations. They knew that in July of 2020; they knew that before we took Ms. Rowe's deposition. Everything in the proposed supplemental allegations is something they've known for months. And the fact that they didn't take his deposition until later, that doesn't add anything. It doesn't add anything at all to the supplemental allegations.

THE COURT: Well, I mean, let's put it to the plaintiff that way. Are there any allegations in here that weren't within your knowledge after July?

MS. JUMPER: Surely, your Honor. The retaliatory motive or any bias that was present when Mr. Vardaman was considering Ms. Rowe, that information, while there was email correspondence that exhibited or demonstrated that Mr. Vardaman did not give Ms. Rowe fair and fulsome consideration for the role, the deposition of Mr. Vardaman was clearly the place where plaintiff was able to really glean and understand whether there was animus or any retaliatory motives that Mr. Vardaman was carrying towards Ms. Rowe. The use of the documentary evidence --

THE COURT: What is it you found out at the deposition that you didn't have already in July?

MS. JUMPER: Sure. During the deposition,

Mr. Vardaman expressed that he -- he expressed that he viewed Ms. Rowe as communicating with him in a manner that felt demeaning. He used alternate disparaging words to describe their interaction and said that, you know, based off of these interactions, he felt as though Ms. Rowe was not, like, a kind person, looked down on him because of his level. So there was further information that we understood through the testimony of Mr. Vardaman that describes or sets the basis for a potential retaliatory motive.

THE COURT: But why -- I think you need to be a little more precise, because if the reason she looked down on him was prior to her, you know, EEO activity, then it wouldn't support your motive. So what specifically came up in the deposition that showed the retaliatory motive?

MS. JUMPER: Sure. I mean, additionally --

THE COURT: I'm sorry -- that you didn't have already?

MS. JUMPER: Sure. He also testified about his interaction with Ms. Rowe with respect to the VP of Sales role. During that conversation --

THE COURT: With respect to -- you're going a little fast. If you could slow down, that would help.

MS. JUMPER: Sure. Of course. He also gave additional context for his consideration of Ms. Rowe for

the VP of Sales role. During that time, Vardaman said that -- you know, he described why he didn't select Ms. Rowe for the VP of Sales role. He also testified that, you know --

THE COURT: You're not really answering my -- you're not answering my question. You're telling me he testified about why he didn't select her. I'm asking a very specific question: What was his specific testimony that supports retaliation that you didn't have as of July?

MS. JUMPER: Well, I apologize if I'm not answering your question, your Honor, but the piece about his consideration of Ms. Rowe for the VP of Sales role is information that we did not have prior to the --

THE COURT: I see. The fact --

MS. JUMPER: -- the deposition.

THE COURT: -- the fact that he considered her for the role; is that your point?

MS. JUMPER: No, your Honor, it's the context of the consideration. During Mr. Vardaman's testimony, he described what information he actually evaluated to consider Ms. Rowe, and it was nothing but a search of her LinkedIn profile. He went through the steps that he took to consider or not consider, in our position, Ms. Rowe for the position. And so it was laying out sort of the non-steps

or the inaction that he took in furtherance of Ms. Rowe's consideration for the VP of Sales role that demonstrates further retaliatory animus based off of his prior comments that are demonstrated in the record about his displeasure or his dislike or potential retaliatory animus towards her.

THE COURT: Okay. So it was the methodology he used to evaluate her that you learned at the deposition, and that in itself showed the retaliatory motive?

MS. JUMPER: I would say yes, but it's not just the methodology, your Honor. His deposition testimony clearly shows that he did not give Ms. Rowe fair consideration or follow the traditional sort of Google steps to consider her for the VP of Sales role, despite her numerous requests to be considered for it.

It also -- we also learned additional information about sort of the scope of the role and what Ms. Clubhouse was looking for for someone to fill that role, and someone who may not have been a traditional salesperson. And that further goes to Ms. Rowe's qualifications for the position.

THE COURT: All right, I'll hear from defendant on this.

MR. GAGE: Your Honor, Ms. Rowe knew in February of 2020 that she was not being considered for that sales job. She knew in February that, because Mr. Vardaman told

her that in February. There's nothing they learned in the deposition that adds to or supports the supplemental allegations. They knew in July of 2020 that the ER investigator who spoke to Mr. Vardaman recorded that Mr. Vardaman thought she was cantankerous -- and I can't remember the other adjectives that were in those notes -- but they knew that in July. And the testimony that Ms. Rowe's counsel just referred to about him feeling talked-down to by Ms. Rowe was his testimony explaining what the ER investigator may have been referring to in the notes that Ms. Rowe had since July. There is nothing they learned in Mr. Vardaman's deposition that they didn't know already that appear in these supplemental allegations. They could have filed this months before; they could have filed it before Ms. Rowe's deposition.

THE COURT: All right.

MS. JUMPER: If I --

THE COURT: No, that's all right. No, that's okay. All right, this is a little bit of a close question, but in the end, the prejudice here is so minimal to the defendants that I don't think that whatever delay here is sufficiently undue that I'm going to prevent them from including this claim.

We're going to have no further discovery from the

plaintiff's point of view. The defendants are going to be burdened by having to take a deposition of the plaintiff if they want on this very narrow topic. It will probably be very small solace to them, but I'm going to require the plaintiff to pay the costs of the deposition. That's not attorney's costs; the actual fee for the court reporter, and if you're doing video, the fee for that. Because the delay -- it was enough delay that I think that they did occasion that problem, but not enough that I'm going to bar it altogether. This is without prejudice to any arguments about not stating a claim or summary judgment or anything like that.

Any questions about my ruling from the defendant's side?

MR. GAGE: No, your Honor.

THE COURT: From the --

MR. GAGE: Thank you.

THE COURT: -- from the plaintiff's side?

MS. JUMPER: No, your Honor.

THE COURT: Okay, so I think we've taken care of that. I'm going to grant the motions to seal. I gather they're unopposed [indiscernible].

And I think we have a little bit of discovery that's filling out. Is there a deadline right now for

summary judgment requests or anything like that or conferences before Judge Schofield?

MS. GREENE: Your Honor, this is Cara Greene. The last Scheduling Order that your Honor filled had a rolling deadline based on your Honor's decision. And now that we have received guidance and orders from your Honor on these points, I would ask that the plaintiff and defendant have a chance to confer and submit an updated Scheduling Order to your Honor.

THE COURT: All right, that makes sense. So when do you think you could do that by? I'm not rushing you. Just give me an idea.

MR. GAGE: Early next week, maybe.

THE COURT: Next week? How about a week from today?

MS. GREENE: That's fine, your Honor. Thank you.

THE COURT: Okay. All right, I'll expect a joint letter; if you can't reach agreement, separate letters, a week from today.

Anything else from the plaintiff's side?

MS. GREENE: Nothing for plaintiff, your Honor.

THE COURT: From defendant?

MR. GAGE: Nothing here, your Honor. Thank you.

THE COURT: Okay. Thank you. Good-bye.

MS. GREENE: Bye-bye.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Rowe v. Google LLC, Docket #19-cv-08655-LGS-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: February 13, 2021